Supreme Court, U.S.
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No. 90-1193

In The

Supreme Court of the United States

October Term, 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A. P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT,

Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

RESPONDENTS' STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The plaintiffs, respondents here, a Gravette Public Schools pupil and the pupil's parents, brought this action in the United States District court for the Western District of Arkansas on July 12, 1989, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. They alleged that the defendant school district and school officials had violated their rights under the establishment of religion and free exercise of religion clauses of the First Amendment to the United States Constitution and under the Fourteenth Amendment, by sponsoring or permitting a program of Christian religious instruction in the Gravette Elementary School.

The plaintiffs' motion for preliminary injunction was heard July 31, 1989, and was decided in their favor on August 3, 1989. The court's memorandum opinion on the preliminary injunction is published at 725 F. Supp. 1499 (W.D. Ark. 1989).

The plaintiffs' motion for summary judgment was granted on November 3, 1989 (725 F. Supp. 1503 (W.D. Ark. 1989)). The plaintiffs then non-suited their claim for relief under the free exercise of religion clause and the defendants timely noted their appeal of the court's orders of August 3 and November 3, 1989.

Subsequent to the defendants filing their notice of appeal on November 30, 1989, several post-judgment motions were decided by the District Court. None of the resulting orders were appealed by either party. Included among those orders was the order denying the defendants' motion for declaratory judgment (January 18, 1990)

that has been included in the petitioners' appendix. That order was issued after closure of the appeal record, and is not before this Court.

The United States Court of Appeals for the Eighth Circuit affirmed per curiam on October 23, 1990, based on the opinion of the District Court.

B. STATEMENT OF FACTS

The Gravette Public School District has, for a number of years, sponsored or permitted a program of Christian religious instruction in the Gravette Elementary School (kindergarten through 5th grade). This instruction is provided by outside volunteers who are not paid by the district and are not certified as elementary teachers under Arkansas law. The religious instruction is provided in the classrooms of the elementary school during that portion of the day that is set aside for instructional time.

The District's involvement includes: (1) Providing public school classrooms for religious instruction; (2) Conducting or permitting the Bible classes during the instructional day; (3) Using school resources to notify parents of the availability of the Bible instruction and to determine which parents desire to have their children attend; (4) Monitoring and supervising attendance at the Bible classes to ensure that only children who have parental permission are attending; (5) Segregating those children who do not have parental permission and supervising them while the Bible classes are conducted; and (6) Arranging the instructional schedule to accommodate the presenting of Bible instruction by outside instructors.

Mr. Paul Dee Human, superintendent of the Gravette Schools, testified at the preliminary injunction hearing that the purpose of the Bible instruction was to give the students an opportunity to learn values. He also testified that the school administration did not participate in selecting the volunteers who would teach the Bible class nor did the administration supervise or approve the content of the instruction.

Ms. Elsie Smith, one of the volunteer Bible teachers, testified that her role was to present to the children what the Bible said, without adding a denominational interpretation. The Bible stories were presented as fact. For instance, the creation story from Genesis 1 was presented as fact; the story of the deliverance of the three Hebrews from the fiery furnace in Daniel 3 was presented as a factual account of a divine miracle; and the story of Jonah and the fish, Jonah 1-2, was presented as fact.

Ms. Smith testified that her choice of readings from the Scripture was intended to emphasize the basics, including divine creation of the world, the fall of man, and parables containing a moral lesson.

In addition to reading or paraphrasing the Scripture text, the Bible instruction classes included songs. Ms. Smith testified as to one of those songs, "This Old Saint". The song contains statements such as "Jesus is God's son", "Jesus died for me", and "Great in heaven is my reward". Ms. Smith testified that those statements were factual in nature and not religious, and that she taught them to her Bible class as statements of fact.

In response to the plaintiffs' motion for summary judgment, the defendants submitted affidavits of two

experts along with affidavits of Ms. Smith, Mr. Human, and the defendants' attorney. One of the experts, Dr. Paul Vitz, testified regarding a study he had performed on the religious content of commonly used public school textbooks. Dr. Vitz concluded that most textbooks in common use do not give balanced treatment to the role religion plays in American life. He stated that he had not examined the textbooks used in the Gravette schools. The other expert, Dr. W.R. Coulson, testified as to the need of children for a sense of moral absolutes in the process of forming values. Dr. Coulson did not claim to have examined the materials or methods used in the religious teaching at the Gravette schools.

Contrary to the statements in the petition at Pages 9 through 13, no other expert affidavits were included with the response to motion for summary judgment. Instead, there was an affidavit by the defendants' attorney summarizing evidence he hoped to elicit from Drs. Burron, Moore, Doty, Berman, and Carnagey. The attorney's double hearsay affidavit was incompetent as evidence, for the attorney had no personal knowledge of the matters in it. Even if the affidavit were good evidence, it did not claim that any of these experts had particular knowledge of the materials or method of instruction in the Gravette schools.

ARGUMENT: REASONS FOR DENYING THE WRIT

The program of Bible instruction in the Gravette Elementary School is strikingly similar to the program of religious instruction that was forbidden in *McCollum v.*

Board of Education, 333 U.S. 203 (1948). In both *McCollum* and *Gravette*, public school pupils who were required by state law to be in attendance at school were released from their secular studies for a period of one-half hour per week to attend classes of religious instruction that were conducted on the tax supported premises of the school district, in the regular classrooms, during the regular hours of instruction. In both cases, pupils could participate in religious instruction only with the express written permission of their parents. Dissenters were not released from their secular studies, but were required, at least in some instances, to leave the classroom and carry on their secular studies elsewhere.

As in *McCollum*, the elementary pupils in the Gravette public schools are subject to compulsory attendance laws. Ark. Code Ann. § 6-18-201 (1987). The number of hours of instruction offered each day is fixed by law, Ark. Code Ann. § 6-16-102 (1987). Teachers and administrators are responsible for supervision and discipline of pupils while they are present during the school day. Ark. Code Ann. § 6-18-505 (1987).

The petitioners attempt to distinguish *McCollum*. First, they assert that since in *McCollum* the religious studies were conducted by various identifiable denominations, the Gravette program is permissible because it is "non-denominational". Indeed, in *McCollum* the ecumenical alliance that sponsored the religious instruction offered at least three points of religious view, while in the Gravette schools only one may be heard. That point of view is distinctly Christian in nature, and is closely identifiable with the fundamentalist branch of Protestantism, with its emphasis on Biblical inerrency, literal divine

miracles, and the imminent second coming to earth of Jesus Christ. Whether the matters of religious belief that are presented in the Gravette schools as "fact" are taken from the statement of faith of any particular Christian denomination is not relevant. The role of the state and of its schools in religion is not to prefer Christianity over other forms of faith, or even to favor theism over non-belief, but rather to maintain a strict neutrality in matters of religion. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

Second, the petitioners contrast *McCollum*, where the classes sometimes were taught by ordained ministers, with *Gravette*, where they are taught by lay persons. The distinction is hardly significant. In *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), this Court invalidated classroom religious exercises that were led not by ministers, and not by lay members of religious groups, but by students themselves, selected at random. It was the religious character of the readings and not the affiliation of the leaders that was determinative in *Schempp*.

Third, the petitioners urge that the *McCollum* complainants had alleged that they were under subtle pressure to attend the religious exercises, while in Gravette there is no such pressure. In fact, the *McCollum* Court found it unnecessary to decide whether the religious instruction was voluntary, as claimed by the state, or subtly coercive, as claimed by the appellant. *McCollum*, 333 U.S. at 207 n.1. Later cases have held that it is not necessary to show any kind of coercion in order to make out an establishment clause violation. See *Schempp*, 374 U.S. at 223.

Writs of certiorari are regarded as "matters of grace" with this Court, *Wade v. Mayo*, 334 U.S. 672 (1948). The Court seldom exercises its discretion to review court of appeals decisions; that discretion "will only be exercised in matters of gravity and general importance", *In Re Woods*, 143 U.S. 202 (1892).

Supreme Court Rule 10 requires "special and important reasons" before the writ will be granted. All cases implicating guarantees of free expression are important but few are "special". This one is not.

The petitioners claim that this case is unique because it offers the Court an opportunity to assess the proper role of the Bible in public education. They argue that since education involves the passing on of culture from one generation to the next, and since culture is ultimately grounded upon values, and values in turn have their roots in religion, therefore the state in performing its educational function must teach the Bible as the Judeo-Christian source of values upon which our national culture is based.[1]

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[1] This argument fails to answer the question of *which* values will be taught by the state's schools, and *which* of the various religious roots of those values will be emphasized. For instance, a course of Bible instruction, such as the one at Gravette, that teaches the fall and depravity of man, the divinity of Christ, and the divine role of Jesus Christ in the redemption of mankind, does little to explain the Judaic roots of our common culture. The Jewish concept of individual responsibility for a just society springs from entirely different religious presuppositions than does the Christian idea of the Golden Rule. The teaching in the public schools of one set of religious premises rather than another inevitably requires the state to prefer one religion over others.

The petitioners assert that "the state . . . carries the primary responsibility for promoting and passing on culture". While there may be a common national culture that binds together our pluralistic society, the respondents believe that they, as parents, have the principal responsibility of teaching values to their children; and that the state should have absolutely no role in teaching religion to their children.

The respondents believe that although the state's schools have an important role in imparting our common national culture and its underlying values, the schools should forebear to make choices among competing religious premises from which those values are derived. One of the most distinctive values that our society recognizes is the power of the individual to make choices amongst those competing religious premises. The Gravette petitioners have invited this court to reverse many decades of constitutional jurisprudence by permitting the public schools to choose the "right" premises.

The petitioners' approach to the teaching of values in the public schools is exemplified in the following passage:

> For the *people of Gravette* have chosen a unique and promising way of coping with the thorny question of whether and how to teach the Bible in public schools. Rather than ignore the Bible and deprive the children of an important educational resource as some have done, and rather than water it down through official courses in "Bible as literature" or "comparative religion" as others have done, the *people of Gravette* have chosen to separate Bible study from the regular curriculum and instead allow it to be taught by non-school persons as a non-sponsored,

non-funded, voluntary activity. (Emphasis added.) Petition for writ of certiorari, 21-22.

It may be that some of the people of Gravette want this program of religious instruction and would be content to default their power of choice to the authority of the state; however, at least three of them do not: they are the respondents in this case. Matters of religious preference ought not to be determined by majority vote of the school board; even less should that school board permit such matters of religious choice to be decided by "non-sponsored, non-funded, non-school, non-denominational" outsiders. In matters of religious belief, each person is a majority of one.

CONCLUSION

For all these reasons, the respondents urge that the petition for writ of certiorari be denied.

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Individually and as Parents and
Next Friends of the Minor,
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